



Martha Lewis Marcus
Senior Attorney

Room 3A225
One AT&T Way
Bedminster, New Jersey 07921-0752
908 532-1841
FAX 832 213-0169
marthamarcus@att.com

May 5, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Notice of Ex Parte Communication**
In re Request to Update Default Compensation Rate
for Dial-Around Calls from Payphones
WC Docket No. 03-225, RM No. 10568

Dear Ms. Dortch:

AT&T respectfully asks the Commission to adopt a new, lower per-payphone compensation rate as part of these proceedings. The Commission should do so regardless of its treatment of the per-call rate for dial-around calls. The D.C. Circuit has already made clear that long-distance carriers such as AT&T could seek relief from the Commission in this proceeding to reconsider the per-payphone rate as part of the current rulemaking proceeding. In doing so, the Commission should take all steps necessary to ensure an accurate estimate of average call volumes for purposes of determining fair per-phone compensation, including the solicitation of updated average call volumes from the ILECs and other payphone service providers ("PSPs").

AT&T recently sought review in the D.C. Circuit of the Commission's establishment of a per-phone compensation rate for payphones without Flex-ANI technology (for which it is not possible to provide per-call compensation). On appeal, AT&T demonstrated that the Commission had based its per-phone figure – derived by multiplying the average number of calls at a payphone by the dial-around rate – on stale data. Specifically, AT&T showed that undisputed record evidence before the Commission demonstrated that the number of calls made at the average payphone had fallen precipitously since the time period on which the Commission relied in calculating the per-phone rate. Nonetheless, the Commission had blinded

itself to the new information and instead based its per-phone compensation figure on obsolete data.

The D.C. Circuit never reached the merits of this question and instead denied AT&T's petition for lack of jurisdiction. *See AT&T v. FCC*, __ F.3d __, No. 03-1017, slip op. at 12 (D.C. Cir. Apr. 16, 2004). In doing so, however, the Court made clear that AT&T could raise these points concerning per-phone compensation in this proceeding. Specifically, the Court noted that its finding of no jurisdiction

does not leave AT&T completely without recourse. The Commission has initiated a new rulemaking proceeding on payphone compensation, at the request of the American Public Communications Council. *See Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, 18 F.C.C.R. 22,811 (Oct. 31, 2003). The new Notice of Proposed Rulemaking recognizes that "industry conditions have changed significantly" and that "[p]ayphone usage and deployment are decreasing as the use of wireless services increases." ¶ 18.

Id.

Moreover, both the Commission and the American Public Communications Council ("APCC"), joined by BellSouth and SBC, stated in their appellate briefs that AT&T could raise its challenge to the per-payphone compensation rate in these proceedings. As the Commission advised the Court, "[i]n the *Third Payphone Order*, the Commission determined the per-call cost as a function of per-phone volume, so it makes sense that the two should be addressed together." Brief for Respondents at 37, *AT&T Corp. v. FCC*, __ F.3d __ (D.C. Cir. Apr. 16, 2004) (No. 03-1017) ("FCC Br."). Likewise, the PSPs have advocated treating these two issues together in this proceeding:

The Commission need not – indeed, legally cannot – keep the current per-phone rates in force in perpetuity. However, it was reasonable for the Commission to defer the application of an adjustment factor until it could conduct a more comprehensive review of the underlying per-call rate, which is also based on estimates of per-phone call volumes. This course was all the more reasonable in light of the fact that a petition to reopen the payphone compensation rate rulemaking was pending when the Commission issued the *Reconsideration Order*. The Commission has subsequently acted upon that petition by issuing a notice of proposed rulemaking – over the objections of the IXCs, who would prefer to deal with per-phone compensation in isolation from consideration of the underlying rate. *See Request to Update Default Compensation Rate for Dial-Around Calls from Payphones*, Order and Notice of Proposed Rulemaking, WC Docket No. 03-225, FCC 03-265 (Oct. 31, 2003).

* * * *

The FCC has now initiated yet another rulemaking to reevaluate the costs and call volumes underlying the dial-around compensation rate. Accordingly, the IXC's "are not left without remedy" for any harm they may be suffering by making some payments at a per-phone rate.

Brief for Intervenor's at 18-19, *AT&T Corp. v. FCC*, __ F.3d __ (D.C. Cir. Apr. 16, 2004) (No. 03-1017).

The D.C. Circuit, the Commission, and all the major parties are therefore in agreement that the Commission should revisit its per-phone compensation rate as part of this proceeding. The Commission should do so by soliciting comprehensive, current data from the ILECs and other PSPs to quantify the trend that all parties have recognized: the decline in the average number of calls made at payphones.¹ There is already significant data before the Commission demonstrating the decline in average call volumes. Specifically, data submitted by the RBOCs, coupled with the quarterly data regarding the number of RBOC payphones, reflect that a weighted average across the relevant RBOC data for the fourth quarter of 2000 through the third quarter of 2001 yields an absolute ceiling on average call volume of only 116 calls per month.² The Commission should use these data along with additional data

¹ The RBOCs have freely admitted that "[c]all volumes at average . . . payphone locations have fallen by *approximately half* since the FCC set the per-call compensation rate," RBOC Reply Comments in Support of Petition for Rulemaking at 1 (Nov. 14, 2002) (emphasis added). Likewise, the Commission has recognized that "it is entirely possible that monthly call volumes per payphone have declined." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Fifth Order on Reconsideration and Order on Remand*, 17 F.C.C.R. 21,274, ¶ 22 (2002) ("*Fifth Order*"). What is more, the Commission has stated that "aging data" should be avoided if possible and that it "should rely on the *best data available*." FCC Br. at 37.

² This is a weighted average derived using the same analysis conducted by the Commission, see *Fifth Order* ¶ 20 n.33, and based upon the relevant data received by the Commission from the RBOCs. See Letter from D. Michael Yost (SBC) to William Caton, re: *Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (March 20, 2002); Letter from D. Michael Yost (SBC) to William Caton, re: *Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (Jan. 22, 2002); Letter from Marie T. Breslin (Verizon) to Magalie Roman Salas, Re: CC Docket No. 96-128, *Implementation of Pay Telephone Reclassification and Compensation* (Mar. 12,

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solicited from ILECs and other PSPs to lower the per-phone compensation rate, and it should do so regardless of how it resolves the competing arguments with regard to per-call compensation.

AT&T accordingly asks the Commission to solicit new, comprehensive, up-to-date and representative data from the ILECs and other PSPs on average call volumes. It should then use these data to calculate a new, lower per-payphone compensation rate.

Sincerely,

/s/

Martha Lewis Marcus

cc: William Dever, Deputy Chief, Competition Policy Division,
Wireline Competition Bureau, william.dever@fcc.gov
Jeffrey Carlisle, Senior Deputy Bureau Chief,
Wireline Competition Bureau, jeffrey.carlisle@fcc.gov
Michelle Carey, Division Chief, Competition Policy Division,
Wireline Competition Bureau, michelle.carey@fcc.gov
Denise Coca, Wireline Competition Bureau, denise.coca@fcc.gov
Darryl Cooper, Wireline Competition Bureau, darryl.cooper@fcc.gov

2002); Letter from Marie T. Breslin (Verizon) to Magalie Roman Salas, Re: CC Docket No. 96-128, *Implementation of Pay Telephone Reclassification and Compensation* (Jan. 22, 2002); Letter from James T. Hannon (Qwest) to William F. Caton, Re: *Implementation of Pay Telephone Reclassification and Compensation* Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 (Mar. 14, 2002); Letter from W.W. Jordan (BellSouth) to William Caton, Re: CC Docket 96-128, Response to Request for Information (Mar. 19, 2002).